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NO.

in the
SUPREME COURT
of the
UNITED STATES

October Term, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida,

Petitioner,

vs.

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND/OR PETITION FOR WRIT OF PROHIBITION TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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QUESTION PRESENTED FOR REVIEW

Pursuant to Rule 34-2, Supreme Court Rules, Respondents state they are dissatisfied with Petitioner's presentation of the Question Presented For Review.

Respondents state the question presented for review is as follows:

> Should the United States Supreme Court assert jurisdiction over a case wherein a State appellate court issued a writ of prohibition against a State trial court for ordering a female juvenile be kept in indefinite and guarded detention, and further ordered that the Secretary of the State social services agency, a non-party, be subject to fine or imprisonment for contempt.

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LIST OF ALL PARTIES TO PROCEEDING

For purposes of the Petition for Writ of Certiorari the parties to this proceeding are Philip G. Nourse, the State of Florida, Department of Health and Rehabilitative Services, and David Pingree.

For purposes of the Petition for Writ of Prohibition, additional parties include the Florida Supreme Court and the Florida Fourth District Court of Appeal.

CITATIONS TO OPINIONS AND JUDGMENTS IN COURTS BELOW

The Orders enumerated on page 1 of Petitioner's brief accurately reflect the Orders at issue in the Courts below.

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION RESTS

Respondents specifically reject Petitioner's assertion that jurisdiction exists for either the Petition for Writ of Certiorari or Petition for Writ of Prohibition.

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, ORDINANCES AND REGULATIONS INVOLVED

Respondents reject Petitioner's enumerated Constitutional Provisions and Statute as being not pertinent to this case or supportive of jurisdiction in the United States Supreme Court.

CONCISE STATEMENT OF THE CASE

The Petition for Certiorari/ Prohibition is a request by a State trial court for review of a denial of the State Supreme Court to review a Writ of Prohibition issued to the trial court by a State appellate court. The Writ of Prohibition was issued because the State appellate court determined the trial court entered an order beyond its jurisdiction and in violation of State law. The trial court's order committed a female juvenile to a specific placement in secure confinement under guard, and further placed the Secretary of the State human services agency (Department of Health and Rehabilitative Services [HRS]) in jeopardy of contempt by fine or imprisonment.

The order of the trial court is invalid as a matter of State law. The State Supreme Court has not ruled on any "...title, right, privilege or immunity specifically set up or claimed under the Constitution...of the United States." Thus, there is no jurisdictional basis for the Petition for Certiorari. Nor, is there any basis in law or fact for the issuance of a Writ of Prohibition by the United States Supreme Court.

SUMMARY OF ARGUMENT

The Petition for Certiorari does not establish grounds on which jurisdiction of the Supreme Court can be invoked.

The final judgment or decree at issue is a denial by the Florida Supreme Court of a request for review of a State appellate court order issuing a Writ of Prohibition to a State trial court. The State Supreme Court order denied review without opinion, and without discussion of any Federal question. The State appellate court issued an opinion which based the issuance of the Writ of Prohibition on violation of State law which demonstrated the trial court was acting beyond its jurisdiction. The opinion of the State appellate court dealt only with State law, and did not consider any

substantial Federal question or any right or privilege granted by the United States Constitution.

A review of the entire case does not reveal any substantive issue regarding Federal law or constitutional rights. The United States constitutional provisions identified on page 4 of Petitioner's petition are inapplicable to the present case. The State proceedings have not involved a denial of equal protection or the inflection of cruel and unusual punishment. Petitioner's arguments are without merit.

Further, Petitioner is without standing to challenge the State action because Petitioner alleges violations of constitutional rights of a third party. Because of this Petitioner cannot maintain standing in the Supreme Court.

In addition, grounds do not exist for the issuance of a Writ of Prohibition. With the exception of the trial court, the lower courts have not exceeded their jurisdiction.

ARGUMENT

I.

This case arose when Petitioner/ trial court entered an Order of Disposition, Commitment to the Department of Health and Rehabilitative Services (Order). The Order is dated nunc pro tunc as of February 28, 1983.

It has been contended by Respondents that the trial court exceeded its jurisdiction by the entry of such an order in that it calls for and commands actions and responsibilities on the part of Respondents not permitted, provided for or allowed by State law; that it exercises jurisdiction over Respondents directly or indirectly, who are not parties to the action, nor appropriately before the trial court in such a proceeding; that it attempts to exercise supervisory control over Respondents in violation of State law, and the

basic doctrine of separation of powers as provided for by statute. The Order further directed a specific site of placement and manner of placement for a female child (secure facility and subject to guard).

The Order further assumed jurisdiction over Respondent, David Pingree, without process or notice to Respondent, David Pingree; and places Respondent, David Pingree, in anticipatory contempt and in jeopardy of a finding of contempt resulting in fine and imprisonment, in that he must detain the child in a secure facility for an indefinite period of time.

The Order provides, in one pertinent part, as follows:

> Therefore this Court orders and adjudges that Wendy Shaw be committed to the Department and be placed in a secure facility and guarded, if necessary, until further order of this court. (Emphasis supplied)

It is axiomatic under State law that Petitioner is without jurisdiction to direct the specific placement and treatment of an individual committed to the Department of Health and Rehabilitative Services. State Ex.Rel. Department of Health and Rehabilitative Services v. Sepe, 291 So.2d 108 (Fla. 3rd DCA 1974). In Sepe the Court stated as follows:

> ...by including in the order... mandatory directions to the state agency as to method and duration of treatment, the trial court proceeded without jurisdiction or in excess of jurisdiction; first because the state agency had not been brought in by proper process, and had not been furnished with notice and an opportunity to be heard thereon. See State ex. rel. O'Dare v. Kehoe, Fla. app. 189 So.2d 268. Secondly, such directions to the state agency purport to designate and control the type of duration of treatment of the person committed, accounted to usurping the jurisdiction of the state agency...to thus invade the

functions of the state agency as a division of the executive department is in derogation of the doctrine of the separation of powers of the state government. (Emphasis added)

Thus, the trial court's Order in the instant case is in excess of its jurisdiction and in derogation of the doctrine of the separation of powers of the State government.

Also informative is the case of the Department of Health and Rehabilitative Services, Division of Mental Health, South Florida State Hospital v. State, 338 So.2d 220 (Fla. 4th DCA 1976). In this case HRS, the State hospital and superintendant, were adjudged to be in criminal contempt of a court order. The contempt order was appealed. The contempt order was overturned because the court, citing Sepe, found the Circuit Court was not directed to provide any certain method of treatment.

In addition, Respondents call this Court's attention to the case of State, Department of Health and Rehabilitative Services v. Wade, 363 So.2d 1180 (Fla. 1st DCA 1978). In Wade HRS sought a writ of prohibition to prevent execution of a Circuit Judge's order directing that a criminal defendant be transported to the Florida State Hospital at Chattahoochee for examination to determine whether he was a mentally deranged sex offender. The court held that the Respondent Judge was acting in excess of the court's statutory jurisdiction of asserting authority over HRS.

Also of great importance is the case of Florida Department of Health and Rehabilitative Services v. Crowell, 327 So.2d 115 (Fla. 1st DCA 1976). In Crowell the court found the Circuit Court (juvenile) was without jurisdiction to

exercise supervisory authority over the Department's Division of Youth Services. The Court found the Legislature had provided for juvenile supervision in Chapter 39, F.S. and Chapter 959, F.S.; and this authority did not indicate supervisory jurisdiction by the Court.

Crowell (specifically for juvenile matters), as well as Sepe, State, and Wade, all cited above, stand for the clear proposition that the Circuit Court in the instant case was without jurisdiction to direct the specific placement of the child and the "treatment" (secure detention under guard).

Therefore, the trial court was clearly without jurisdiction or authority to compel Respondents to place the child in mandatory lockup (secure detention) and under guard.

The foregoing provisions of the trial court's Order are:

(1) clearly in excess of its jurisdiction;

(2) clearly violates the dictates of the Florida appellate courts and the cases of Sepe, Wade, State and Crowell;

(3) attempts to exercise jurisdiction, under penalty of imprisonment, over Respondent, David Pingree, when the trial court clearly lacks in personem jurisdiction over Respondent; and no prior notice or opportunity for hearing has been accorded Respondent. The trial court's attempted exercise of jurisdiction over Respondent, David Pingree, was erroneous, was in excess of lawful authority, and without any jurisdictional basis. Respondent, David Pingree, further submits that even if the Court had personem jurisdiction over Respondent's

official capacity as chief executive officer of the Department of Health and Rehabilitative Services, Respondent Pingree could not personally be subject to fine or imprisonment for supervisory functions to be carried out in his official capacity.

II.

None of the State court proceedings involved Federal questions or United States' Constitutional rights arising from state conduct which could serve as a basis to invoke the Supreme Court's jurisdiction. On the contrary, if any United States' Constitutional argument could be made, the argument would be made against the trial court Order which Petitioner seeks to uphold. This Order, in direct contravention of State law, places a female juvenile in

confinement and under guard for an indefinite period. This Order is contrary to the constitutional right of the juvenile to appropriate care and opportunity for rehabilitation. To place the juvenile in indefinite confinement would frustrate any meaningful attempts at rehabilitation. United States' Constitutional infirmities can also be found in the trial court's Order as it relates to Respondent, David Pingree. Pingree, not a party to the trial court's proceedings, was ordered to guard the juvenile if necessary, and failing to do so, subject himself to punishment of fine or imprisonment. This is a clear denial of due process.

Petitioner rests his case on the Fourteenth Amendment to the United States Constitution. In particular, Petitioner cites to equal protection and cruel and unusual punishment.

Petitioner's argument in support of its equal protection assertion is found on page 19 of its petition. There, Petitioner asserts that children and adults are treated differently. This is not a denial of equal protection. Equal protection requires similar people be dealt with in a similar manner and people of different circumstances not be treated as if they were the same. Frost v. Corporation Commission, 278 U.S. 515, (1929); Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 720 (1928). It is obvious that female juveniles and criminal adults are not similar or equal classes. It is clear that attempts to rehabilitate these classes could be at variance without creating a denial of equal protection. The standard of review of State law under the equal protection clause requires only the State

law bear some rational relationship to legitimate State purposes. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, (1973).

Petitioner's argument based on cruel and unusual punishment is equally without basis. Petitioner's argument is that rehabilitation on a training school campus for female juveniles would be cruel and unusual punishment if the rehabilitation was not conducted under guard and in confinement. Such is not the case. The primary purpose of the cruel and unusual punishment clause of the Eighth Amendment is directed at the method of kind of punishment imposed for the violation of criminal statutes. Ingraham v. Wright, 430 U.S. 651 (1977). In the instant case the female juvenile cannot be characterized as a criminal,

nor can her rehabilitation, not under lock and key, be characterized as punishment.

III.

The instant case involves only State law. The United States Supreme Court will not review for Federal error judgments of State courts that rest on undisputed and adequate State grounds. Super Tire Engineering Co. v. McConkle, 550 F.2d 903, cert. denied, 474 U.S. 827 (1977), rehearing denied, 434 U.S. 1025, (1978); Durley v. Mayo, 351 U.S. 277 (1956), rehearing denied, 352 U.S. 895 (1956) ; Dixon v. Duffy, 342 U.S. 33, (1951). Such is the case here. There is no Federal question at issue. The lower court appellate decisions were decided on State law.

The Orders in the lower court establish that a Federal question was not

addressed by the State courts. The United States Supreme Court does not have jurisdiction to review a State court's decision unless it appears affirmatively that a Federal question was presented for decision to the highest court of the State having jurisdiction, that the decision of a Federal question was necessary to determine the cause, that the Federal question was actually decided, or that judgment as rendered could not have been given without deciding it. Southwestern Bell Telephone Co. v. State of Oklahoma, 303 U.S. 206 (1938).

Even if it is assumed that a Federal question was decided, it is clear that it would not be substantial enough to warrant jurisdiction. Honeyman v. Hanan, 300 U.S. 14 (1937); Seaboard Air Line Ry Co. v. Watson, 287 U.S. 86, (1922).

IV.

In this case Petitioner bases constitutional claims on the rights of a third party - a female juvenile. Because of this, Petitioner does not have the requisite standing necessary to obtain jurisdiction in the U.S. Supreme Court. The general rule is that parties may not claim standing in the Supreme Court to address the alleged constitutional rights of a third party or to challenge State action by invoking the rights of others. Barrows v. Jackson, 346 U.S. 249 (1953), rehearing denied, 346 U.S. 841 (1953).

Petitioner states that jurisdiction rests on a "title, right, privilege or immunity specifically set up or claimed." None exists in this case, nor, since Petitioner relies on the rights of a third party, does Petitioner

have the requisite standing to assert such a right. Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op Marketing Assn., 276 U.S. 71 (1928).

V.

Petitioner has not demonstrated any basis for the issuance of a writ of prohibition by the United States Supreme Court. It is a well-established principle of law that prohibition only lies when a lower court exceeds its jurisdiction. Ex Parte Fassett, 142 U.S. 479 (1892). Petitioner has not demonstrated, or even alleged, that the Fourth District Court of Appeal of the State of Florida, or the Supreme Court of the State of Florida have exceeded their jurisdiction.

Prohibition is an extraordinary writ to be used only for extraordinary causes. Ex Parte Fahley, 332 U.S. 258 (1947). Petitioner has not advanced

any arguments to demonstrate that this cause is an extraordinary cause.

Thus, it is clear that prohibition does not lie in this case.

CONCLUSION

Petitioner's Petition for Writ of Certiorari and/or Prohibition is without merit.

A Writ of Certiorari should not be granted because:

(1) The Order of the Florida Fourth District Court of Appeal issuing a Writ of Prohibition against the Petitioner/ trial court was well-justified;

(2) This case does not involve a substantial Federal question;

(3) This case involves only State law; and

(4) Petitioner does not have standing.

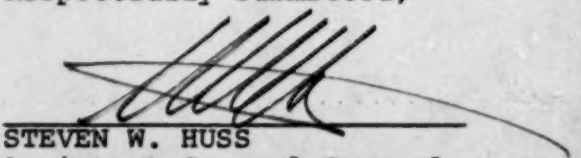
A Writ of Prohibition should not be granted because:

(1) The Appellate Courts of the State of Florida have not exceeded their jurisdiction; and

(2) This cause is not an extraordinary case warranting the issuance of a Writ of Prohibition.

For the above reasons, Respondents respectfully request the United States Supreme Court dismiss and deny the Petition for Writ of Certiorari and/or Prohibition.

Respectfully submitted,



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